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Everest Point Sdn Bhd & Anor v Lim Peck Sim & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-33–04 OF 2015(W)

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RAUS SHARIF PCA, RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASAN LAH, RAMLY ALI AND ZAHARAH IBRAHIM FCJJ

24 MAY 2017

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Contract — Sale and purchase of property — Liquidated damages — Cut-off date for computation of liquidated and ascertained damages ('LAD') payable by developer to buyers for late delivery of vacant possession — Developer completed apartment 2 1/2 years later than contracted completion date and notified buyers

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once certificate of fitness for occupation ('CFO') for building issued — Buyers refused to take delivery of vacant possession and only took possession of keys to apartment 5 1/2 years later — Whether buyers could only claim LAD until time they were notified by developer that CFO had been issued as that was effective date of delivery of vacant possession by developer — Whether buyers could not be

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allowed to unjustly enrich themselves to developer's prejudice by seeking to obtain a larger amount of LAD by refusing to take delivery of vacant possession after being notified that CFO had been issued

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The respondents were joint buyers of an apartment ('the unit') in a housing project developed by the first appellant ('A1'). Under the sale and purchase agreement ('SPA') between the parties, A1 was required to complete and deliver vacant possession of the unit to the respondents by 28 June 2008 failing which it had to pay the respondents liquidated and ascertained damages ('LAD') at the rate of 10%pa of the purchase price calculated from day to day from

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28 June 2008 until the date the respondents took delivery of vacant possession. A1 only completed the unit 2 1/2 years after 28 June 2008 and then by a letter dated 16 November 2010, notified the respondents that they could take delivery of vacant possession. The parties agreed that this was an invalid notice as A1 did not comply with all the conditions it had to satisfy under cl 25.2 of

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the SPA in order for the notice to be a valid one for delivery of vacant possession. On 30 May 2011, A1 notified the respondents that the certificate of fitness for occupation ('CFO') for the unit had been issued by the relevant authority and requested the respondents to settle various monies they were required to pay under the SPA so that they could be given possession of the

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unit. The respondents, however, refused to make any payment or to accept delivery of vacant possession of the unit. On 16 April 2014, the respondents wrote to A1 indicating their intention to take vacant possession of the unit but they only took physical possession of the unit on 20 September 2016 when they collected the keys to the unit from A1. In the meantime, on 26 April 2012,

the respondents had filed a suit in the High Court against A1 for, inter alia, an order that they be allowed to claim LAD from 28 June 2008 until the date they took actual vacant possession of the unit (which eventually turned out to be 20 September 2016). The respondents were adamant that they would not accept delivery of vacant possession unless A1 had settled the full amount of the LAD due to them and unless the unit had been fitted with all items and fixtures that A1 had allegedly promised to install there. In the respondents' suit, A1 counterclaimed for the payment of various charges including monies towards maintenance and the sinking fund and for late payment interest. The High Court dismissed the counterclaim and allowed the respondents' claim for LAD but limited the claimable period to 30 May 2011, ie, the date the respondents were notified of the issuance of the CFO by A1. The court deemed that that was the date vacant possession of the unit was delivered to the respondents. The respondents appealed to the Court of Appeal ('the COA') solely on the issue of the cut-off date for computation of the LAD. The COA allowed the appeal and allowed the LAD to be claimed up until 16 April 2014, ie the date the respondents wrote to A1 indicating their intention to take vacant possession of the unit. In the instant appeal against the COA's decision, the main question posed to the Federal Court was whether vacant possession of the unit was delivered to the respondents when they were notified of the issuance of the CFO or when they took possession of the keys to the unit.

Held, allowing the appeal, setting aside the decision of the COA and reinstating the decision of the High Court:

(1) The cut-off date for calculation of the LAD was 30 May 2011 as decided by the High Court. The unit was completed and was safe for occupation as certified in the CFO which was issued on 25 May 2011 and notified to the respondents on 30 May 2011. The effective date of delivery of vacant possession was the date when the issuance of the CFO by the appropriate authority was notified to the respondents, which was on 30 May 2011 (see para 40).

(2) To allow the respondents to take their own 'sweet time' to take delivery of vacant possession of the unit, and consequently enjoy a higher amount of LAD (despite the issuance of the CFO being notified to them) was clearly unjustified and unfair to the first appellant. The first appellant might be prejudiced and might suffer damages for loss and damage to the unit and/or to fixtures and fittings therein if the respondents took too long to take vacant possession; more so, if the respondents were allowed to claim LAD for the extended period. This might not be good for the housing industry. The imposition of LAD was not to enrich the respondents by their refusal or delay to take delivery of vacant possession even though they were duly notified that the unit was certified to be safe for occupation (see para 39).

(3) When the CFO to the unit was issued and the respondents were notified about it, the respondents could no longer resist vacant possession by refusing to fulfill their obligation to make payment of the balance purchase price in the manner stipulated under the SPA and by making unreasonable demands. The respondents were not entitled to claim for LAD until the date they took actual vacant possession by taking the keys to the unit as that amounted to inflating the LAD claim to the prejudice of the first appellant and an unjust enrichment to the respondents (see para 34).

(4) The first appellant's obligation to deliver vacant possession of the unit was governed by cl 25 of the SPA. It had done all that it was required to do under the SPA to deliver vacant possession of the unit and was willing and ready to deliver vacant possession when the CFO was issued. The respondents failed to perform their part under the SPA by tendering the balance purchase price and other monies due and payable in respect of the unit. The installation of items and fixtures in the unit as requested for in the respondents' letter was something that was not included in the SPA. It was also not a term of the SPA that vacant possession of the unit had to be delivered together with the balance of the LAD payment that the respondents claimed to be entitled to. The requests made by the respondents were clearly unreasonable (see paras 31 & 35).

(5) The fact that the first appellant's notice dated 16 November 2010 to the respondents to take delivery of vacant possession was invalid did not mean that it had failed in its obligations under the SPA to deliver vacant possession (see para 35).

[Bahasa Malaysia summary

Responden-responden adalah pembeli bersama pangsapuri ('unit tersebut') dalam projek perumahan yang dimajukan oleh perayu pertama ('A1'). Di bawah perjanjian jual beli ('PJB') di antara pihak-pihak, A1 dikehendaki untuk menyiapkan dan memberi milikan kosong unit tersebut kepada responden-responden pada 28 Jun 2008 jika gagal ia kena membayar kepada responden-responden ganti rugi tertentu dan ditetapkan ('LAD') pada kadar 10% setahun terhadap harga belian yang dikira dari hari ke hari dari 28 Jun 2008 sehingga tarikh responden-responden menerima milikan kosong tersebut. A1 hanya menyiapkan unit tersebut 2 1/2 tahun selepas 28 Jun 2008 dan kemudiannya melalui surat bertarikh 16 November 2010, memberitahu responden-responden bahawa mereka boleh menerima milikan kosong. Pihak-pihak bersetuju bahawa ini adalah notis tak sah kerana A1 tidak mematuhi kesemua syarat-syarat yang ia perlu penuhi di bawah klausa 25.2 PJB tersebut untuk notis tersebut menjadi sah bagi penerimaan milikan kosong. Pada 30 Mei 2011, A1 memberitahu responden-responden bahawa sijil kelayakan menduduki ('CFO') bagi unit tersebut telah dikeluarkan oleh pihak berkuasa relevan dan memohon responden-responden untuk

menyelesaikan pelbagai wang yang mereka dikehendaki untuk membayar di bawah PJB dengan itu mereka boleh diberikan milikan terhadap unit tersebut. Responden-responden, walau bagaimanapun, enggan untuk membuat apa-apa bayaran atau untuk menerima milikan kosong terhadap unit tersebut. Pada 16 April 2014, responden-responden menulis kepada A1 menunjukkan niat mereka untuk menerima milikan kosong terhadap unit tersebut tetapi mereka hanya menerima milikan fizikal terhadap unit tersebut pada 20 September 2016 apabila mereka mengambil kunci-kunci kepada unit tersebut daripada A1. Sementara itu, pada 26 April 2012, responden-responden telah memfailkan tindakan di Mahkamah Tinggi terhadap A1 untuk, antara lain, perintah bahawa mereka dibenarkan untuk menuntut LAD dari 28 Jun 2008 sehingga tarikh mereka menerima milikan kosong sebenar terhadap unit tersebut (yang mana akhirnya adalah pada 20 September 2016). Responden-responden adalah berkeras bahawa mereka tidak akan menerima penyerahan milikan kosong kecuali A1 telah menyelesaikan jumlah penuh LAD yang kena dibayar kepada mereka dan kecuali unit tersebut telah dipasang dengan kesemua barang dan lekapan yang A1 telah didakwa berjanji untuk memasang di unit tersebut. Dalam tindakan responden-responden, A1 menuntut balas bagi bayaran pelbagai caj termasuk wang untuk penyelenggaraan dan dana terikat dan untuk faedah bayaran lambat. Mahkamah Tinggi menolak tuntutan balas tersebut dan membenarkan tuntutan responden-responden bagi LAD tetapi mengehadkan tempoh boleh menuntut kepada 30 Mei 2011, iaitu, tarikh responden-responden diberitahu mengenai keluaran CFO oleh A1. Mahkamah menganggap bahawa ia adalah tarikh milikan kosong terhadap unit diberikan kepada responden-responden. Responden-responden merayu kepada Mahkamah Rayuan ('MR') satu-satunya atas isu tarikh tamat tempoh bagi pengiraan LAD. MR membenarkan responden-responden menulis kepada A1 menunjukkan niat mereka untuk menerima milikan kosong terhadap unit tersebut. Dalam rayuan terhadap keputusan MR, soalan utama yang dikemukakan kepada Mahkamah Persekutuan adalah sama ada milikan kosong terhadap unit tersebut diserahkan kepada responden-responden apabila mereka diberitahu mengenai keluaran CFO tersebut atau apabila mereka mengambil milikan terhadap kunci-kunci kepada unit tersebut.

Diputuskan, membenarkan rayuan, mengetepikan keputusan MR dan mengembalikan keputusan Mahkamah Tinggi:

(1) Tarikh pemotongan bagi pengiraan LAD adalah 30 Mei 2011 seperti yang diputuskan oleh Mahkamah Tinggi. Unit tersebut siap dan selamat untuk diduduki seperti yang disahkan di dalam CFO yang mana dikeluarkan pada 25 Mei 2011 dan memberitahu kepada responden-responden pada 30 Mei 2011. Tarikh efektif penyerahan milikan kosong adalah tarikh apabila keluaran CFO oleh pihak berkuasa yang wajar diberitahu kepada responden-responden, yang mana adalah

A pada 30 Mei 2011 (lihat perenggan 40).

(2) Untuk membenarkan responden-responden mengambil 'sweet time' mereka untuk menerima penyerahan milikan kosong terhadap unit tersebut, dan akibatnya menikmati jumlah LAD yang lebih tinggi (meskipun keluaran CFO diberitahu kepada mereka) jelas tidak berjustifikasi dan tidak adil kepada perayu pertama. Perayu pertama mungkin akan diprejudiskan dan mengalami kerugian dan kerosakan kepada unit tersebut dan/atau kepada lekapan dan kelengkapan di dalamnya jika responden-responden mengambil masa yang lama untuk mengambil milikan kosong; lebih lagi, jika responden-responden dibenarkan untuk menuntut LAD bagi tempoh yang dilanjutkan. Ini mungkin tidak baik bagi industri perumahan. Pengenaan LAD bukan untuk memperkaya responden-responden dengan keengganan atau kelewatan untuk menerima milikan kosong walaupun mereka telah diberitahu bahawa unit tersebut disahkan selamat untuk diduduki (lihat perenggan 39).

(3) Apabila CFO kepada unit tersebut dikeluarkan dan responden-responden diberitahu mengenainya, responden-responden tidak boleh lagi menahan milikan kosong dengan menolak untuk memenuhi tanggungjawab mereka untuk membuat bayaran baki harga belian dalam cara yang ditetapkan di bawah PJB dan dengan membuat tuntutan yang tidak munasabah. Responden-responden tidak berhak untuk menuntut LAD sehingga mereka menerima milikan kosong sebenar dengan mengambil kunci-kunci kepada unit tersebut kerana ia merupakan untuk menaikkan tuntutan LAD dengan memprejudiskan perayu pertama dan pengkayaan tak adil kepada responden-responden (lihat perenggan 34).

(4) Tanggungjawab perayu pertama untuk menyerahkan milikan kosong terhadap unit tersebut dikawal oleh klausa 25 PJB. Ia menjalankan kesemua yang dikehendaki dibuat di bawah PJB untuk menyerahkan milikan kosong apabila CFO dikeluarkan. Responden-responden gagal untuk menjalankan bahagian mereka di bawah PJB dengan menender baki harga belian dan wang lain yang kena dan boleh dibayar berkaitan unit tersebut. Pemasangan barang dan lekapan di dalam unit tersebut seperti yang diminta di dalam surat responden-responden adalah sesuatu yang tidak termasuk di dalam PJB. Ia juga bukan terma di dalam PJB tersebut bahawa milikan kosong unit tersebut terpaksa diserahkan bersama baki bayaran LAD yang responden-responden menuntut bahawa mereka berhak ke atasnya. Permintaan-permintaan yang dibuat oleh reponden-responden adalah jelas tidak munasabah (lihat perenggan 35 & 31).

(5) Fakta bahawa notis perayu pertama bertarikh 16 November 2010 kepada responden-responden untuk menerima milikan kosong adalah tak sah

tidak bermaksud bahawa ia telah gagal dalam tanggungjawabnya di bawah PJB untuk memberi milikan kosong (lihat perenggan 35).]

Notes

For cases on liquidated damages, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6814–6815.

Cases referred to

Golden Quantum Acres Sdn Bhd v SSU Management Services Sdn Bhd [2014] 10 CLJ 320, HC (folld)

Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors [2008] 4 MLJ 852; [2008] 4 CLJ 618, CA (not folld)

Soon Teik Development Sdn Bhd v Liew Tuo Chee & Ors [2011] 6 MLJ 350, CA (folld)

Legislation referred to

Uniform Building By-Laws 1984 Second Schedule, Form E

Appeal from: Civil Appeal No W-02-(NCVC)(W)-741–04 of 2014 (Court of Appeal, Putrajaya)

Ong Chee Kwan (Han Li Meng with him) (Christopher & Lee Ong) for the appellants.

NV Sree Harry (Sree Harry & Co) for the respondents.

Ramly Ali FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellants against the decision of the Court of Appeal given on 27 October 2014 which, inter alia, allowed the respondents' appeal on the issue of the respondents' claim for liquidated ascertained damages ('LAD') in respect of an apartment unit up to a cut-off date of 16 April 2014 (being the date the respondents were deemed to have taken actual vacant possession of the apartment unit).

[2] For ease of reference we shall refer to the appellants herein as the defendants and the respondents as the plaintiffs as they were respectively referred to in the High Court.

[3] The High Court had earlier allowed the plaintiffs' claim for LAD against the first defendant up to 30 May 2011 (being the date of the notification by the first defendant to the plaintiffs of the issuance of the certificate of fitness for occupation ('CFO') by the appropriate authority). On

appeal by the plaintiffs on the cut-off date for the calculation of the LAD, the Court of Appeal on 27 October 2014 reversed the decision of the High Court on that issue, and ordered that the cut-off date for the plaintiffs' claim for the LAD be extended to 16 April 2014 (being the date when the plaintiffs wrote to the first defendant indicating their intention to take possession). Dissatisfied with the said order of the Court of Appeal the defendants then appealed to this court.

[4] We heard the appeal on 21 March 2017 and allowed it with costs. We set aside the decision of the Court of Appeal and reinstated the decision of the High Court. We now give our reasons for doing so.

BACKGROUND FACTS

[5] The plaintiffs were joint purchasers of an apartment in a project developed by the first defendant which was known as Subang Olive Residence, Unit No J1-K-13-1 ('the unit'). For that purpose a sale and purchase agreement dated 29 June 2005 was entered into by the parties ('the SPA').

[6] Clause 24.1 of the SPA provides that the unit shall be completed and vacant possession shall be delivered to the plaintiffs within 36 months from the date of the SPA (ie on or before 28 June 2008). Under cl 24.2, if the first defendant fails to deliver vacant possession of the unit as stipulated in the SPA, the first defendant shall be liable to pay the plaintiffs LAD calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price from the expiry date for delivery of vacant possession until the date the plaintiffs take delivery of vacant possession of the unit.

[7] The first defendant was unable to deliver vacant possession within the stipulated period of 36 months. The unit was only completed some 2 1/2 years later.

[8] In an attempt to deliver vacant possession the first defendant issued a notice of delivery of vacant possession dated 16 November 2010 to the plaintiffs. However it is not in dispute that the said notice was invalid on the ground that it was not supported by a letter of confirmation from the appropriate authority certifying that Form E as prescribed under the Second Schedule to the Uniform Building By-Laws 1984 had been duly submitted and checked and accepted by the appropriate authority, as required in cl 25.2 of the SPA. It also not in dispute that the first defendant only submitted the relevant Form E to the relevant authority on 13 May 2011. The CFO in respect of the unit was duly issued by the appropriate authority on 25 May 2011. The first defendant did not issue a new notice of delivery of vacant possession upon issuance of the CFO.

[9] On 30 May 2011, the first defendant notified the plaintiffs about the issuance of the CFO for the unit. On 16 April 2014, the plaintiffs wrote to the first defendant indicating their intention of taking vacant possession of the unit. However the plaintiffs only took actual vacant possession of the unit on 20 September 2016.

[10] The plaintiffs commenced an action against the first defendant at the High Court on 26 April 2012, inter alia, for an order that the plaintiffs be allowed to claim continuous LAD from 28 June 2008 until the date they took actual vacant possession (on 20 September 2016).

[11] The first defendant filed its counterclaim against the plaintiffs for an amount of RM105,199.76 for miscellaneous charges such as maintenance charges, sinking fund and late payment interest.

[12] On 21 March 2014, the High Court allowed the plaintiffs' claim for LAD but only up to 30 May 2011 being the date of the notification of the issuance of the CFO for the unit. The first defendant's counterclaim was dismissed. At para 5 of the grounds of judgment the learned judge ruled:

> 5. Tempoh pembayaran ganti rugi jumlah tertentu yang boleh dituntut oleh plaintif-plaintif, pada pandangan saya, adalah dari 28 Jun 2008–30 Mei 2011 iaitu tarikh plaintif-plaintif dimaklumkan tentang pengeluaran sijil layak menduduki (eksh P13), iaitu selama 1067 hari. Pada tarikh pengeluaran mengikut perkiraan dalam klausa 24.2, RM141.23 sehari x 1067 = RM150,692.41. Amaun ini adalah terakru untuk dibayar pada 30 Mei 2011 di mana plaintif disifatkan telah mengambil milikan kosong (sila rujuk kes Mahkamah Rayuan *Soon Teik Development Sdn Bhd v Liew Tuo Chee & Ors* [2011] 6 MLJ 350).

[13] At para 22 of the grounds of judgment, the learned judge stressed that 'Adalah penghakiman saya bahawa milikan kosong telah disifatkan diberikan kepada plaintif pada 30 May 2011 iaitu tarikh plaintif dimaklumkan tentang pengeluaran sijil layak menduduki'.

[14] Dissatisfied with the above decision, the plaintiffs appealed to the Court of Appeal only on the issue of the cut-off date for the calculation of LAD. The Court of Appeal allowed the plaintiffs' appeal in that their claim for continuous LAD be extended up to 16 April 2014, being the date of the plaintiffs' letter to the first defendant indicating their intention to take vacant possession of the unit.

AT THE FEDERAL COURT

[15] On 21 April 2015, this court granted the defendants leave to appeal on the following questions of law, namely:

(a) in cases of an invalid notice of vacant possession, when is vacant possession delivered:

(i) the date of certificate of fitness for occupation ('CFO'); or

(ii) the date when the purchaser took possession of the keys to the unit; and

(b) in cases of an invalid notice of vacant possession, can there be two different vacant possession dates in the sale and purchase agreement?

[16] In the instant case, it is not in dispute that there was delay in the completion and delivery of vacant possession of the unit to the plaintiffs. The delivery period of 36 months as stipulated in cl 24.1 of the SPA had lapsed, and pursuant to cl 24.2 of the SPA the first defendant as the developer was liable to pay LAD as a result of the delay.

[17] It is also not in dispute that the notice of delivery of vacant possession dated 16 November 2010 issued by the first defendant to the plaintiff was invalid for non-compliance with the requirement in cl 25.2 of the SPA as the first defendant had not submitted the relevant Form E as prescribed in the Second Schedule to the Uniform Building By-Laws 1984 to the relevant authority. It is also not in dispute that the CFO to the unit was issued on 25 May 2011 and the plaintiffs were duly notified by the first defendant about it on 30 May 2011; and the plaintiffs only took actual vacant possession by taking the keys to the unit on 20 September 2016, after the commencement of this case at the High Court.

[18] The only issue in dispute relates to the cut-off date for the computation of the LAD to be paid by the first defendant to the plaintiffs. The question is when was vacant possession deemed delivered? Was it on the date the plaintiffs were notified of the issuance of the CFO for the unit or the date when the plaintiffs took actual possession by taking the keys to the unit?

[19] Learned counsel for the defendants contended that the cut-off date should be the date the plaintiffs were notified that had been issued; while learned counsel for the plaintiffs contended that the cut-off date was the date when they took possession of the keys to the unit on 20 September 2016.

[20] The first defendant notified the plaintiffs about the issuance of the CFO for the unit on 30 May 2011. In the said notification the first defendant informed the plaintiffs 'that all the above approvals from the authorities to enable you to occupy your property have been obtained. The approval is available for your inspection at our officer. Please be reminded that you have yet

to pay/settle the progressive payment and miscellaneous charges amount of RM92,312.26 as per statement enclosed. Kindly make good of the said payment soonest possible'.

[21] The manner of delivery of vacant possession of the unit to the plaintiffs is governed by cl 25 of the SPA. Under cl 25.1, the first defendant shall let the plaintiffs into possession of the unit, inter alia, after the plaintiffs 'having paid all monies payable under clause 4 in accordance with the Third Schedule and all monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement'.

[22] The Third Schedule to the SPA deals with the schedule of payment of the purchase price. Item 3 of the Schedule provides that 'on the date the Purchaser takes possession of the said Parcel with water and electricity supply ready for connection to the Parcel', the plaintiffs as purchasers need to pay (12.5%) of the purchase price. Item 4, provides that 'within twenty-one (21) working days after receipt by the Purchaser of the written confirmation of the Vendor's submission to and acceptance by the Appropriate Authority of the application for subdivision of the said Building', the purchasers need to pay 2.5% of the purchase price; and Item 5.

[23] Clause 25.2 of the SPA reads:

> 25.2 The delivery of vacant possession by the Vendor shall be supported by:
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> (a) a certificate signed by the Vendor's architect certifying that the said Building has been duly constructed and completed in accordance with the relevant Acts, by-laws and regulations and that all conditions imposed by the Appropriate Authority in respect of the issuance of the Certificate of Fitness for Occupation have been duly complied with; and
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> (b) a letter of confirmation from the Appropriate Authority certifying that the Form E as prescribed under the Second Schedule to the Uniform Building By-Laws 1984 has been duly submitted by the Vendor and checked and accepted by the Appropriate Authority.

[24] Clause 25.3 of the SPA reads:

> 25.3 Such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the Parcel until such time as the Certificate of Fitness for Occupation for the said Building is issued.

[25] To fulfill the requirement prescribed in cl 25.2(a) of the SPA, a certificate of practical completion of the unit in question signed by the first defendants' architect was issued on 9 November 2010; and the CFO in respect thereof was issued by the Majlis Perbandaran Subang Jaya, as the appropriate authority, on 25 May 2011. With the issuance of both certificates we can

A conclusively conclude that all conditions required for the issuance have been duly complied with. The CFO clearly certified that the said unit (apartment) in question 'telah siap dibina ... mengikut pelan kelulusan No A1 286/9/2 dan bahawa bangunan itu adalah layak untuk diduduki seperti yang diperakui oleh Arkitek'.

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[26] In the certificate of practical completion, the architect had certified that: '... in our opinion ... the works are practically completed and the contractor has performed and completed all the necessary works specified in the Contract on the day named 9 November 2010'.

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[27] As required by cl 25.2(b) of the SPA, a letter of confirmation from the Majlis Perbandaran Subang Jaya as the appropriate authority dated 13 May 2011, certifying that the Form E as prescribed in the Second Schedule to the Uniform Building By-Laws 1984 had been submitted by the first defendant and checked and accepted by the Majlis, was issued.

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[28] Pursuant to cl 25.3 of the SPA, the plaintiffs have the right to occupy the unit after the CFO was issued but not before that. As required by cl 25.1 of the SPA, in order to take vacant possession of the unit the plaintiffs, inter alia, need to pay all monies due and payable under the SPA, the amount of which as stated in the first defendant's notification dated 30 May 2011 was RM92,312.26.

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[29] According to the evidence of SD1, the general manager of the first defendant, the first defendant wanted to deliver vacant possession after the issuance of the CFO, but the plaintiffs refused to take it. The plaintiff insisted that they were entitled to LAD and they did not need to pay the balance of the purchase price of the unit at all. The plaintiffs only took physical possession of the unit when they took the keys to the unit from the first defendant on 20 September 2016.

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[30] The learned judge had made her findings that *keterangan menunjukkan bahawa plaintif mengikat penyerahan milikan kosong kepada dua syarat. Pertamanya, plaintif mahu baki bersih ganti rugi tertentu diberikan bersekali dengan milikan kosong. Keduanya, penyerahan milikan kosong mesti diiringi dengan unit tersebut dilengkapi dengan peralatan yang dikatakannya telah dijanjikan oleh defendan pertama sebagaimana yang terkandung dalam surat plaintif pertama di eksh P16 yang, antara lain, menyebut*:

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> Therefore, what LAD we have claimed so far is only an interim amount, for the final quantum of LAD can only be determined when you actually deliver Vacant Possession of the unit installed with all the items and fixtures as pledged in your letters (one dated 31.5.2005 and two dated 29.06.2005) copies enclosed.

We await your instruction when we can take delivery of Vacant Possession of the unit together with the balance of LAD we are legally entitled to.

[31] After going through all the evidence in this case, we were satisfied that the first defendant as the developer was willing and ready to deliver vacant possession of the unit when the CFO was issued. All the relevant requirements for delivery of vacant possession as stipulated in cl 25.2 of the SPA were fulfilled by the first defendant. The plaintiffs have failed to perform their part of the SPA by tendering the balance purchase price and other monies due and payable in respect of the unit, which had been clearly notified in the notification from the first defendant dated 30 May 2011. The installation of all the items and fixtures as requested in the plaintiffs' letter is something not included in the SPA. It is also not a term of the SPA that vacant possession of the unit must be delivered together with the balance of the LAD payment that the plaintiffs claimed to be entitled to. The requests were clearly unreasonable.

[32] In holding that the cut-off date for the payment of LAD by the first defendant would be the date the plaintiffs took actual vacant possession of the unit, the Court of Appeal was relying on the decision in *Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors* [2008] 4 MLJ 852; [2008] 4 CLJ 618 where it was held that as the notice of delivery of vacant possession was invalid (as in the instant case), the purchasers were entitled to continue to claim LAD until they took actual possession of their apartments.

[33] With respect, we are of the view that the decision in *Sentul Raya* cannot be applied to the facts of the instant case. The factual matrix in that case is different from the factual matrix in this case. In that case there was no CFO issued at the time the LAD claim was filed in court as the project in question had not been completed yet. Thus the question of the cut-off date for the LAD claim was still open. However, in the instant case, the construction the unit in question was completed and the CFO was duly issued and the plaintiffs as purchasers were duly informed about the issuance, before the LAD claim was filed in court.

[34] Our view is that when the CFO to the unit was issued and its issuance notified to the plaintiffs, the plaintiffs could no longer resist vacant possession by refusing to fulfil their obligation to make payment of the balance purchase price in the manner as stipulated in the SPA and making unreasonable demands. When the CFO was issued, the unit was certified to be safe for occupation. In the circumstances the plaintiffs are not entitled to claim for LAD until the date when they took actual vacant possession by taking the keys to the unit. This may amount to an inflated claim for LAD which is prejudicial to the first defendant. It also amounts to unjust enrichment of the plaintiffs.

[35] The plaintiffs must realise that the first defendant's obligation to deliver vacant possession of the unit to the plaintiffs is governed by cl 25 of the SPA. The first defendant had done all that needed to be done under the SPA, ie to deliver vacant possession of the unit which was certified to be safe for occupation. The fact that the earlier delivery notice dated 16 November 2010 issued by the first defendant to the plaintiffs was invalid does not mean that the first defendant has failed in its obligations under the SPA to deliver vacant possession.

[36] On this issue, we agree with the dictum of Nallini Pathmanathan J in *Golden Quantum Acres Sdn Bhd v SSU Management Services Sdn Bhd* [2014] 10 CLJ 320 when Her Ladyship said:

> It does not follow from the foregoing that the plaintiffs are entitled to choose a date which they deem fit to 'take' or 'claim' vacant possession. To allow such a construction of cll 26 and 27 would give rise to a vastly exaggerated claim, as it would then theoretically be open to the plaintiffs to take possession some ten years after the practical completion of the building and make claim for LAD.

[37] By such delay in exercising their right to take delivery of vacant possession, the plaintiffs are taking advantage of a more attractive benefit set out in the artificial formula for computation of LAD for late delivery of vacant possession.

[38] We also agree with the Court of Appeal in *Soon Teik Development Sdn Bhd v Liew Tuo Chee & Ors* [2011] 6 MLJ 350, in affirming the High Court decision to the effect that 'in the absence of a proper certificate of practical completion pursuant to clause 25 of the Agreement being issued, the shop lots must be presumed to have not been completed until the issuance of the certificate of fitness for occupation ('CF') or anytime before'. In other words, the shop lots in that case were deemed or presumed to be completed upon the issuance of the CFO.

[39] To allow the plaintiffs to take their own 'sweet time' in taking delivery of vacant possession of the unit consequently seeking to enjoy a higher amount of LAD (despite the issuance of CFO being notified to them), is clearly unjustified and unfair to the first defendant as the developer. The first defendant may be prejudiced and suffer damages for loss and damage to the unit and/or to fixtures and fittings therein if the plaintiffs took too long to take vacant possession; more so if the plaintiffs are allowed to claim LAD for the extended period. This may not be good for the housing industry. The imposition of LAD is not to enrich the plaintiffs by refusing or delaying to take delivery of vacant possession even though the unit was certified to be safe for occupation and they were duly notified about that.

CONCLUSION

[40] For the above reasons and based on the facts and circumstances of the instant case, it was our finding that the unit in question had been completed and was safe for occupation as certified in the CFO which was issued on 25 May 2011 and notified to the plaintiffs on 30 May 2011. As the earlier notification by the first defendant dated 16 September 2010 was invalid, we were of the view that the effective date of delivery of vacant possession in this case was the date when the issuance of the CFO by the appropriate authority was notified to the plaintiffs which was on 30 May 2011. Therefore the cut-off date for calculation of LAD relating to the late delivery of vacant possession of the unit was 30 May 2011, as earlier decided by the High Court.

[41] We therefore allowed the appeal with costs. We set aside the decision of the Court of Appeal and reinstated the decision of the High Court.

[42] In the circumstances of this case we found it unnecessary to answer the two questions posed in this appeal.

Appeal allowed, the decision of the COA set aside and the decision of the High Court reinstated.

Reported by Ashok Kumar